Ch'ng Team Soo @ Cheng Chiu Seng & Ors v Khor Hok Kee & Ors

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HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–26 OF 2005
CHEW SOO HO JC
1 JUNE 2011

C

Civil Procedure — Locus standi — Want of locus standi — Action commenced by office bearers of unregistered society — Whether lack of locus standi mere irregularity or a substantive point of law — Defendant having option to strike out action or raise want of locus standi in defence

D

Civil Procedure — Parties — Locus standi — Society — Unregistered society — Whether office bearers of unregistered society could maintain action against defendant — Societies Act 1966 s 6(1)

E

Civil Procedure — Striking out — Want of locus standi — Action commenced by office bearers of unregistered society

Unincorporated Associations — Societies — Registration — Unregistered society — Locus standi — Whether office bearers of unregistered society could maintain action against defendant — Societies Act 1966 s 6(1)

F

Unincorporated Associations — Societies — Registration — Unregistered society — Whether burial ground management committee independent body or merely sub-committee of registered temple management committee

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The plaintiffs held positions in the committee of Tanah Perkuburan Hokkien Leong Hock, also known as Leong Hock Teong ('LHT'). The defendants held positions in the Committee of Persatuan Penganut Dewa Leong Hock Beoh, also known as Leong Hock Beoh ('LHB'). LHT was anonymous to Leong Hock burial ground where Leong Hock was the actual name while the word Teong' in Hokkien dialet means 'burial ground'. The word 'Beoh' in LHB means 'temple' in Hokkien; hence Leong Hock Beoh meant Leong Hock Temple. The dispute by the parties was over the burial ground known as LHT. According to the plaintiffs, LHT was a separate entity from LHB and was managed by a management Committee of LHT itself whereas the defendants alleged that LHT was not an independent body but was part of LHB being

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managed by its subcommittee who were generally the Committee Members of LHB. The defendants averred that according to the Chinese customs, a burial ground must always come under the management and supervision of a temple. LHB being the governing temple claimed to have the right to sell the burial grounds and collect the payments for the sale of the burial lots. LHB was registered under the Societies Act 1966 ('the Act') on 16 July 1997 while LHT was registered on 28 January 2005 under the Act. The plaintiffs' claim against the defendants herein was filed on 14 January 2005 which was before LHT was registered. The plaintiffs claimed against the defendants for an injunction to restrain the defendants from selling the burial lots and for a declaration that only the plaintiffs were responsible for the supervision and the sale of the burial lots. The defendants counterclaimed for a declaration that the said lands were properties of LHB. The issues raised by both parties were: (a) whether the plaintiffs had the locus standi to commence this action against the defendants; (b) whether LHT was an independent body having its own rights over the burial lots or whether it was part and parcel of LHB which should be the body having the rights and responsibility over the burial lots; (c) whether the plaintiffs were estopped from claiming any rights over the burial ground; (d) whether the plaintiffs were entitled to register LHT separately; and (e) whether the defendants had proved their counterclaim.

Held, dismissing the plaintiffs' claim and allowing the defendants' counterclaim:

(1) The plaintiffs had not registered 'Jawatankuasa Tanah Perkuburan Hokkien Leong Hock' as a society in compliance with s 6(1) of the Act. The plaintiffs, thus by suing the defendants in plaintiffs' respective designations as chairman, secretary, treasurer and assistant treasurer of an unregistered society, were taking part in an activity of or on behalf of the society. Pursuant to the Act, the plaintiffs had no capacity or locus standi to do so unless the society was duly registered (see para 8).

(2) The issue of locus standi is not just a question of irregularity but it is a substantive point of law for reason that if one had no locus standi, his action cannot be maintained. Order 2 r 2 of the Rules of the High Court 1980 pertaining to the question of irregularity was not applicable; the *Malayan United Finance Bhd v Sun Chong Construction Sdn Bhd & Ors*, distinguished (see para 7).

(3) The defendants had two courses in the present case ie to file an application to strike out plaintiffs' case for want of locus standi or to raise the issue in their defence. They were entitled to elect one of the two courses and could not be estopped from doing so. There was no waiver as contended by the plaintiff and estoppel did not operate against the defendants for raising this issue in argument which they had specifically

pleaded in their amended defence; *Lai Yoke Ngan v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (FC) referred (see para 11).

(4) Although LHT had been set up since 1932 and a Committee had been set up in 1953 with temporary rules, there was no evidence to show that they had acted independently thereafter. The book which contained minutes of meetings only commenced in the year 1991. The mere fact that LHT was formed itself did not prove conclusively that it was an independent body (see para 25).

(5) Although LHT had formed its own Committee with temporary rules, it had all along been cared and managed by LHB. It was the same Committee of LHB who managed the affairs of LHT for all those years preceding its registration. LHT has been construed and accepted as a subcommittee of LHB since time memorial and this seemed to carry on until such time when the first plaintiff attempted to change it. From the existing Chinese custom, the historical aspect of both LHB and LHT and the conduct of the parties particularly the first plaintiff, the court held that on a balance of probabilities LHT was not an independent body but that it was an arm of LHB (see para 30).

(6) Whether a party can be said to approbate and reprobate is basically to be assessed from the conduct of the party. There was approbation and reprobation wherein estoppel arose to estop the plaintiffs from reneging and asserting that LHT was a separate body, independent from LHB (see para 32).

[Bahasa Malaysia summary

Plaintif-plaintif memegang jawatan-jawatan dalam jawatankuasa Tanah Perkuburan Hokkien Hock Leong, yang juga dikenali sebagai Teong Hock Leong ('LHT'). Defendan-defendan memegang jawatan-jawatan dalam jawatankuasa Persatuan Penganut Dewa Leong Hock Beoh, yang juga dikenali sebagai Leong Hock Beoh ('LHB'). LHT, tidak diketahui oleh tanah perkuburan Leong Hock, yang mana tanah perkuburan Leong Hock adalah nama sebenarnya manakala Teong adalah perkataan dalam dialek bahasa Hokkien yang bermaksud tanah perkuburan. Perkataan 'Beoh' dalam LHB bermaksud 'kuil' dalam bahasa Hokkien; maka Leong Hock Beoh bermakna Kuil Leong Hock. Pertikaian oleh pihak-pihak adalah mengenai tanah perkuburan yang dikenali sebagai LHT. Menurut plaintif-plaintif, LHT adalah entiti berasingan daripada LHB dan diuruskan oleh jawatankuasa pengurusan LHT sendiri manakala defendan-defendan mendakwa bahawa LHT bukan sebuah badan bebas tetapi adalah sebahagian daripada LHB yang diuruskan oleh jawatankuasa kecil yang secara amnya adalah ahli jawatankuasa LHB. Defendan-defendan menegaskan bahawa mengikut adat Cina, tanah perkuburan mestilah sentiasa berada di bawah pengurusan dan penyeliaan sebuah kuil. LHB, sebagai kuil yang mengawal selia mendakwa mempunyai

hak untuk menjual tanah perkuburan dan mendapat bayaran bagi penjualan lot kubur. LHB telah didaftarkan di bawah Akta Pertubuhan 1966 ('Akta') pada 16 Julai 1997 manakala LHT telah didaftarkan pada 28 Januari 2005 di bawah Akta. Tuntutan plaintif-plaintif terhadap defendan-defendan telah difailkan pada 14 Januari 2005 iaitu sebelum LHT didaftarkan. Plaintif-plaintif menuntut daripada defendan-defendan bagi mendapatkan suatu injunksi untuk menghalang defendan-defendan daripada menjual lot kubur dan bagi suatu perisytiharan bahawa hanya plaintif-plaintif yang bertanggungjawab bagi penyeliaan dan penjualan lot kubur. Defendan-defendan menuntut balas bagi suatu perisytiharan bahawa tanah-tanah tersebut adalah harta LHB. Isu-isu yang dibangkitkan oleh kedua-dua pihak adalah: (a) sama ada plaintif-plaintif mempunyai locus standi untuk memulakan tindakan ini terhadap defendan-defendan; (b) sama ada LHT adalah sebuah badan bebas yang mempunyai hak-hak tersendiri ke atas lot kubur atau sama ada ia adalah sebahagian LHB, badan yang sepatutnya mempunyai hak dan tanggungjawab ke atas lot kubur; (c) sama ada plaintif-plaintif diestop daripada menuntut apa-apa hak ke atas tanah perkuburan; (d) sama ada plaintif-plaintif berhak untuk mendaftar LHT secara berasingan; dan (e) sama ada defendan-defendan telah membuktikan tuntutan balas mereka.

Diputuskan, menolak tuntutan plaintif-plaintif dan membenarkan tuntutan balas defendan-defendan:

(1) Plaintif-plaintif tidak mendaftarkan 'Jawatankuasa Tanah Perkuburan Hokkien Leong Hock' sebagai persatuan menurut s 6(1) Akta. Dengan menyaman defendan-defendan, plaintif-plaintif, masing-masing sebagai pengerusi, setiausaha, bendahari dan naib bendahari bagi suatu persatuan yang tidak berdaftar, telah mengambil bahagian dalam aktiviti atau bertindak bagi pihak persatuan. Menurut Akta tersebut, plaintif-plaintif tidak mempunyai kapasiti atau locus standi untuk berbuat demikian melainkan jika persatuan tersebut telah didaftarkan dengan sewajarnya (lihat perenggan 8).

(2) Isu locus standi bukan sahaja suatu persoalan ketidakteraturan tetapi merupakan perkara substantif undang-undang kerana jika seseorang tidak mempunyai locus standi, tindakannya tidak boleh dikekalkan. Aturan 2 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 mengenai persoalan ketidakteraturan adalah tidak terpakai; *Malayan United Finance Bhd v Sun Chong Construction Sdn Bhd & Ors*, dibezakan (lihat perenggan 7).

(3) Defendan-defendan mempunyai dua cara dalam kes ini iaitu untuk memfailkan permohonan untuk membatalkan kes plaintif-plaintif kerana ketiadaan locus standi atau membangkitkan isu tersebut dalam pembelaan mereka. Mereka berhak untuk memilih salah satu daripada

dua cara dan tidak boleh diestop daripada berbuat sedemikian.Tidak terdapat penepian seperti yang dihujahkan oleh plaintif-plaintif dan estopel tidak beroperasi terhadap defendan-defendan yang membangkitkan isu ini dalam hujah yang mana mereka telah secara khususnya mengaku dalam pembelaan terpinda; *Lai Yoke Ngan v Chin Teck Kwee* [1997] 2 MLJ 565 (MP), dirujuk (lihat perenggan 11).

(4) Walaupun LHT telah ditubuhkan sejak 1932 dan sebuah jawatankuasa telah ditubuhkan pada tahun 1953 dengan peraturan-peraturan sementara, tiada bukti yang menunjukkan bahawa mereka telah bertindak secara bebas selepas itu. Buku yang mengandungi minit mesyuarat hanya bermula pada tahun 1991. Fakta bahawa LHT telah ditubuhkan, dengan sendirinya, tidak membuktikan secara konklusif bahawa ia adalah sebuah badan bebas (lihat perenggan 25).

(5) Walaupun LHT telah membentuk jawatankuasanya sendiri dengan peraturan-peraturan sementara, ia telah dijaga dan diuruskan oleh LHB sepanjang masa. Jawatankuasa LHB yang sama juga menguruskan hal ehwal LHT bagi kesemua tahun sebelum pendaftaran. LHT telah ditafsirkan dan diterima sebagai jawatankuasa kecil LHB sekian lama dan ini seolah-olah berterusan sehingga plaintif pertama cuba untuk mengubahnya. Berdasarkan adat Cina yang sedia ada, aspek sejarah kedua-dua LHB dan LHT dan tindakan pihak-pihak terutamanya plaintif pertama, mahkamah memutuskan bahawa atas imbangan kebarangkalian, LHT bukanlah suatu badan bebas tetapi adalah satu cabang LHB (lihat perenggan 30).

(6) Sama ada satu-satu pihak itu boleh dikatakan bersetuju dan mencela, pada asasnya, dinilai daripada perlakuan pihak-pihak. Terdapat persetujuan dan celaan di mana estopel timbul untuk mengestop plaintif daripada menolak dan menegaskan bahawa LHT adalah sebuah badan yang berasingan, bebas dari LHB (lihat perenggan 32).]

Notes

For cases on locus standi, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5663–5686.

For cases on registration, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3150–3152.

Cases referred to

Datuk Musa Aman & Ors v Tan Sri Chong Kah Kiat [2009] MLJU 987; [2010] 6 CLJ 134, CA (folld)

Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai Kg Sdn Bhd) and another appeal [2006] 1 MLJ 505, CA (refd)

Golden Vale Golf Range & Country Club Sdn Bhd v Hong Huat Enterprises Sdn Bhd [2005] 5 MLJ 64; [2005] 5 CLJ 289, HC (folld)
Karthiyayani & Anor v Lee Leong Sin & Anor [1975] 1 MLJ 119, FC (folld)
Kordial Kor d/o Kundang Singh v EC Controlled Demolition Sdn Bhd & Ors [2002] 7 MLJ 386; [2002] 6 CLJ 295, HC (refd)
Lai Yoke Ngan v Chin Teck Kwee & Anor [1997] 2 MLJ 565; [1997] 3 CLJ 305, FC (refd)
Malayan United Finance Bhd v Sun Chong Construction Sdn Bhd & Ors [1995] 4 MLJ 741, HC; [1995] 1 LNS 130, HC (distd)
Paramill Sdn Bhd & Anor v Datuk Joseph Pairin Ketingan [2007] 7 MLJ 289; [2007] 6 CLJ 192, CA (refd)
Peart v Bolckow Vaughan & Co [1925] 1 KB 399, CA (folld)
Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd [2004] 2 MLJ 31, CA (refd)
Teo Kim Huatt v AETNA Universal Insurance Bhd (No 1) [2002] 2 MLJ 333, HC (refd)
Verschures Creameries Ltd v Hull & Netherlands Steamship Co Ltd [1921] 2 KB 608, CA (folld)
Woon Ngee Yew and Others v Ng Yoon Thai and Others [1941] 1 MLJ 37, HC (refd)

Legislation referred to

Evidence Act 1950 s 48
Rules of the High Court 1980 O 2 r 2, O 33 r 2
Societies Act 1966 s 2, 4, 5, 6, 6(1), (2), 13(2)

Mustapha Shamsuddin (Praba & Associates) for the plaintiff.
TK Cheng (Cheong Wai Meng & Van Buerle) for the defendant.

Chew Soo Ho JC:

BRIEF FACTS

[1] The plaintiffs, vide their statement of claim, pleaded that they are holding the respective positions as herein above stated in Tanah Perkuburan Hokkien Leong Hock which is known as Leong Hock Teong ('LHT') while the defendants are sued in their respective capacity as Chairman, Secretary and Treasurer of Persatuan Penganut Dewa Leong Hock Beoh or more commonly known as Leong Hock Beoh ('LHB'). Leong Hock Teong ('LHT') is anonymous to Leong Hock Burial Ground where Leong Hock is the actual name while the word Teong' in Hokkien dialet means 'burial ground'. The word 'Beoh' in Leong Hock Beoh ('LHB') means 'temple' in Hokkien; hence Leong Hock Beoh means Leong Hock Temple.

[2] The dispute by the parties herein is over the burial ground known as

LHT. This burial ground is located in lands under Lot 833, 834, 3423, 2353 and 2228 Mk 5, Daerah Seberang Perai Utara, Pulau Pinang ('the said lands'). According to the plaintiffs, LHT is a separate entity from LHB and is managed by a management Committee of LHT itself whereas defendants alleged that LHT is not an independent body but is part of LHB being managed by its subcommittee who are generally the Committee Members of LHB. The defendants averred that according to the the Chinese customs, a burial ground must always come under the management and supervision of a temple. LHB being the governing temple has the right to sell the burial grounds and collect the payments for the sale of the burial lots.

[3] Persatuan Penganut Dewa Leng Hock Beoh, Seberang Perai, Pulau Pinang (LHB) was registered under the Societies Act 1966 on 16 July 1997 while Persatuan Pengurusan Tanah Perkuburan Cina Hokkien Leong Hock Teong, Permatang Sintok, Seberang Perai Utara, Pulau Pinang was registered on 28 January 2005 under the same Act. The plaintiffs' claim against the defendants herein, however, was filed on 14 January 2005 which was before LHT was duly registered.

[4] The first plaintiff alleged that when he took over as chairman of LHB from the then chairman of LHB, Ong Cheok Teow when the latter died in 1997, until 2003, he held two positions ie as the chairman of LHB and the chairman of LHT. In the year 2004, after the first plaintiff had not been re-elected in LHB on 12 April 2003 when the first defendant was elected as chairman of LHB, the first plaintiff alleged that trouble started then as the defendants had without the consent and approval of the plaintiffs sold the allocation of the burial ground of LHT and received payment thereof which was allegedly in breach of the vested interest of LHT that, as contended by the plaintiffs, held the sole right to sell the burial ground. Thus, the plaintiffs claim against the defendants for an injunction to restrain the defendants or their servants and/or agents from selling the lots of burial ground in the said lands and a declaration that only the plaintiffs as the Committee of Tanah Perkuburan Hokkien Leong Hock is responsible for the supervision, care and the sale of the lots of burial ground in the said lands, inter alia.

[5] The defendants, on the other hand, counterclaimed for a declaration that the said lands are properties of LHB, that only they as the Committee of LHB which also entitled them to act as Committee of LHT, are responsible for the care, supervision and the sale of the lots on the burial ground of the said lands. The defendants also prayed for an order that the certificate of registration dated 28 January 2005 and the Constitution of Persatuan Pengurusan Tanah Perkuburan Cina Hokkien Lock Hock Teong, Permatang Sintok, Seberang Perai Utara are not valid and that such registration be rescinded and cancelled by Jabatan Pertubuhan Pulau Pinang. It is further claimed, inter alia, that the

first and second plaintiffs shall return to the first defendant as chairman of LHB all records and documents of LHB and LHT inclusive the titles of the said lands and all statements of account, account and related documents of the sale of the burial lots. The defendants contended that all along since time memorial, LHT had been under the care and management of LHB even during the years when first plaintiff became the acting chairman and chairman of LHB.

THE ISSUES

[6] The issues raised by both parties are deduced as follows:

(a) whether the plaintiffs have the locus standi to commence this action against the defendants;

(b) whether LHT is an independent body having its own rights over the burial ground in respect of the sales and allocation of the burial lots or whether it was part and parcel of LHB which should be the body having the rights and responsibility for the care, supervision and the sale of the burial lots in the said lands;

(c) whether the plaintiffs are estopped from claiming any rights over the said burial ground;

(d) whether the plaintiffs are entitled to register separately Persatuan Pengurusan Tanah Perkuburan Cina Hokkien Leong Hock Teong; and

(e) whether the defendants have proved their counterclaim.

EVALUATION AND FINDINGS

First issue: locus standi

[7] The plaintiffs had submitted that the question of locus standi is a non-issue as an unincorporated body has the locus standi to sue and plaintiffs' society had been subsequently registered with the first plaintiff as the chairman and second plaintiffs as the treasurer. It was contended that the defendants had not made an application under O 33 r 2 of the Rules of the High Court 1980 ('RHC') to determine this issue and to set aside the irregularity but had proceeded to file their defence and other processes till the case is set for trial. Thus, the plaintiffs argued that the defendants had waived the irregularity referring to O 2 r 2 of the RHC and the case of *Malayan United Finance Bhd v Sun Chong Construction Sdn Bhd & Ors* [1995] 4 MLJ 741; [1995] 1 LNS 130. The defendants, on the other hand, submitted that it is clear that the plaintiffs' society was not registered at the time of filing of this action. The issue of locus

standi had been raised in the defendants' pleadings as in bundle A pp 24–29. The plaintiffs had not made any application to amend the writ and their statement of claim on the fact of the registration. Learned counsel for the defendants submitted that the Malayan United Finance Bhd's case is distinguishable and does not apply since the defendants had pleaded the issue of locus standi in their pleading.

[8] It is an undisputed fact at the time this writ was filed, Persatuan Pengurusan Tanah Perkuburan Cina Hokkien Leong Hock Teong, Permatang Sintok, Seberang Perai Utara, Pulau Pinang ('the Persatuan') which the plaintiffs were purportedly its members, was not incorporated as this writ was dated 14 January 2005 (bundle A p 2) while the certificate of registration under the Societies Act 1966 (Act 335) of the Persatuan was issued on 28 January 2005 (bundle B p 44). The plaintiffs sued as chairman, secretary, treasurer and assistant treasurer of Jawatankuasa Tanah Perkuburan Hokkien Leong Hock. This 'Jawatankuasa Tanah Perkuburan Hokkien Leong Hock', by its name, has never been registered or incorporated as a society under the Societies Act 1966 at the time of filing of this writ or at any time thereafter.

[9] The subsequent registration vide bundle B p 44 is under the name of 'Persatuan Pengurusan Tanah Perkuburan Cina Hokkien' and not 'Jawatankuasa Tanah Perkuburan Hokkien'. In any event, whatever the name and style of the subsequent registration under the Societies Act 1966 of LHT, it will not have any effect on the capacity of the plaintiffs because such registration does not carry any retrospective effect. The fact remains that 'Jawatankuasa Tanah Perkuburan Hokkien Leong Hock' for which the plaintiffs were allegedly the designated officials, was and is never duly registered under the Societies Act 1966. Section 6 of the Act provides:

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> (1) Every local society other than that in respect of which an order made under section 5 is in force shall, in the manner prescribed make application to the Registrar for registration under this Act.
>
> (2) Until a local society is registered under this Act, no person shall, without a written permission of the Registrar, organize or take part in any activity of or on behalf of the society, except only to apply to, or correspond with the Registrar.
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> (3) Any person committing a breach of subsection (2) shall on conviction be liable to a fine not exceeding five thousand ringgit, and where the breach is a continuing one to a fine not exceeding five hundred ringgit for every day after the first day during which the breach continues.

[10] By 'local society', s 2 of the Act gives its meaning as 'any society organised and established in Malaysia or having its headquarters or chief place

of business in Malaysia, and includes any society deemed to be established in Malaysia by virtue of s 4. Section 4 deems a society to be established in Malaysia if any of its office-bearers or members resides in Malaysia, inter alia, although it is organised or has its headquarters or chief place of business outside Malaysia. Section 5 provides the Minister with the power to declare a society unlawful. By the fact that the plaintiffs had not registered 'Jawatankuasa Tanah Perkuburan Hokkien Leong Hock' as a society in compliance with s 6(1) of the Societies Act 1966, sub-s (2) has made it explicit that 'no person shall, without a written permission of the Registrar (of Societies), organize or take part in any activity of or on behalf of the society, except only to apply to, or correspond with the Registrar'. The plaintiffs, thus by suing the defendants in plaintiffs' respective designations as chairman, secretary, treasurer and assistant treasurer of an unregistered society, to this court, are taking part in an activity of or on behalf of the society as what they are seeking are basically for a declaration to confer upon them as the committee members of the said unregistered society the rights over the said burial ground in disputes, inter alia, pursuant to the Societies Act 1966, I am of the view that the plaintiffs would have no capacity or locus standi to do so unless the society is duly registered bearing in mind that s 6(1) of the Act mandates every local society to apply for registration or unless with the written permission of the registrar of societies under s 6(2) of the Act, which nevertheless was not obtained by the plaintiffs.

[11] On the plaintiffs' submission of this being a non-issue, I agree with the submission in reply by the defendants that the fact of locus standi was specifically pleaded in their amended defence and counterclaim as in bundle A pp 24–39 particularly at para 3. Thus, the defendants can raise it in submission. I do not agree that the issue of locus standi is just a question of irregularity but that it is a substantive point of law for reason that if one had no locus standi, his action cannot be maintained. Order 2 r 2 of the RHC pertaining to the question of irregularity is not applicable. *The Malayan United Finance Bhd v Sun Chong Construction Sdn Bhd & Ors* which referred to the failure to make an application to set aside a judgment in default within a reasonable time but respondent took fresh steps by entering appearance and filing a defence well after becoming aware of the alleged irregularity on the process of service, is clearly distinguishable from the facts of instant case. In my view, there is no such breach of O 2 r 2(1) of the RHC in the instant case. The defendants indeed have two courses in the situation as the present case ie to file an application to strike out the plaintiffs' case or to raise the issue in their defence. They are entitled to elect one of the two courses and cannot be estopped from doing so. However, if after having taken all steps to file their defence and to continue with the other processes of the court, assuming they took out an application to strike out plaintiffs' claim for want of locus standi, probably, estoppel may arise to preclude them from changing course because by electing to pursue one of the two courses opened to them, they have thereby led the opponent to believe that they have abandoned the other; see *Lai Yoke Ngan v*

Chin Teck Kwee & Anor [1997] 2 MLJ 565 (FC). I do not agree that there is waiver as contended by the plaintiffs or that estoppel would operate against the defendants for raising this issue in argument which they have specifically pleaded in their amended defence. The registration of the plaintiffs' Persatuan was on 28 January 2005, two weeks after this action was filed, which the plaintiffs must be well aware of. Surprisingly, no attempt was made to amend or to substitute the unregistered society with the registered one. The plaintiffs have not only left the issue open but also have joined issue with the defendants vide the plaintiffs' reply to counterclaim (bundle A p 40 para 2) particularly relating to para 3 of the amended defence which defendants pleaded that plaintiffs have no right to commence this action. Having taken this course of action plaintiffs, therefore, cannot renege to contend that this is non-issue especially when they have joined issue with the defendants; estoppel would arise in the circumstances; see *Lai Yoke Ngan*. Consequently, I reject the plaintiffs' submission that this issue of locus standi is non-issue.

[12] Learned counsel for the plaintiffs has cited The Supreme Court Practice 1997 Vol 1 Part I para 6/5/5 which refers to unincorporated body but I find that it has nothing to do with the issue of locus standi or the capacity of the officials of an unregistered society as it pertains to the question of necessary endorsements as to the solicitors, if any, and address to be made before the writ is issued pursuant to the RSC (Rev) 1962 O 6 r 5.

[13] Learned counsel for the defendants submitted that according to the minutes of meeting of LHT dated 14 July 2004 at bundle F p 24 which is the annexure to the application for registration of society by the first and second plaintiff, there was no such position as assistant treasurer as admitted by the first plaintiff (SP1) in relation to the fourth plaintiff. Therefore the fourth plaintiff had held no position in so far as the unregistered society of the plaintiff is concerned which the first plaintiff also agreed in evidence. With that admission by the first plaintiff, I must hold that the fourth plaintiff had no capcity to be a party in this proceeding to sue at all. Is the 'Jawatankuasa Tanah Perkuburan Hokkien Leong Hock' a private trust body? No clear evidence had been led to prove that this 'Jawatankuasa' was in fact a private trust body. Although the plaintiff had submitted that part of the said lands ie Lot 3423 was conveyed to Ching Tee and Song Cheok Kow, both since deceased, as joint tenants in trust for the benefit of the said burial ground of LHT, there was nevertheless no evidence to show that this society had been conveyed with the trust or its committee members being appointed as trustees for the said property. As it stands, there is no evidence of the certainty of the said lands being trust property and who are the trustees after the demise of Ching Tee and Song Cheok Kow. Further, Lot 3423 is only part of the burial ground. No evidence was led to show the other lands Lot 833, 834, 2353 and 2228 are trust properties. The land titles for Lot 833 (bundle B pp 54–56), 834 (bundle B

pp 57–59), interim register for Holding No 2353 (bundle B p 68) and Holding No 2228 (B p 69) do not show that the lands are trust properties and the parties named are trustees. In any event, the burden is on the plaintiffs if they so intended to allege that it was a private trust body. From the evidence of both plaintiffs' witnesses SP1 and SP2, they had never stated that this 'Jawatankuasa Tanah Perkuburan Hokkien Leong Hock' was a private trust body nor that they and/or others were the trustees. In *Datuk Musa Aman & Ors v Tan Sri Chong Kah Kiat* [2009] MLJU 987; [2010] 6 CLJ 134 (CA) as cited by learned counsel for the defendants, His Lordship Abdul Hamid Embong JCA (now FCJ) in delivering the judgment of the Court of Appeal has held, inter alia, that:

> (1) No property or rights had been settled for the purposes of the Foundation. A basic prerequisite of a valid trust was thus missing in this instance. In the absence of any subject vested onto the trustees the foundation was merely a charity. The foundation could not be said to be a validly constituted private trust when there had not been settled in the trustees any subject. Another feature which negated the supposition that the Foundation was a private trust was the absence of any definite object ie 'a somebody in whose favour the court can decree performance'. Thus, the essential prerequisites of a valid trust (ie certainty of words, of subject, of object) were missing.

[14] In the instant case, the essential pre-requisites of a valid trust as mentioned by His Lordship Abdull Hamid Embong above were not proved with sufficient evidence to satisfy the plaintiffs' burden and onus of proof. The mere fact that Lot 3423 bought by Ching Tee and Song Cheok Kow and held as joint tenants in trust for LHT alone does not make all the other lands in the said lands to be trust properties. The essential pre-requisites of a valid trust must be proved by the plaintiffs. The plaintiffs had claimed that they are the constructive trustees. I find that the plaintiffs cannot find an easy way out to contend simply that they are the constructive trustees when there is no evidence except for Lot 3423 that the other lands were to be held as trust properties. From the facts and evidence before the court, the 'Jawatankuasa Tanah Perkuburan Hokkien Leong Hock' which was neither a registered society nor an incorporated private trust, would have no locus standi to maintain its action and to allow it to stand would be an abuse of the court's process: per His Lordship Abdull Hamid Embong in *Datuk Musa Aman*'s case, and accordingly I so hold. Hence the plaintiffs would have no capacity to sue the defendants herein.

[15] In the event I am to err on this issue, I shall consider the following issues raised.

Second issue: Whether LHT is an independent body or it is part of LHB

[16] The plaintiff through evidence of SP1 (the first plaintiff) and SP2 (the fourth plaintiff) contended that LHT is an independent body having its chairman, secretary, treasurer and members; it is not part and parcel of LHB. They contended that LHB has no rights over the burial ground. Conversely, the defendants contended otherwise. Defence called seven witnesses, six of whom basically testified to the effect that LHT had been under the care of LHB and the chairman and the other committee members of LHB would be the same for LHT. LHB and LHT are not two separate bodies. In the light of these conflicting evidence, the approach of the court in such circumstances is as aptly stated by His Lordship Low Hop Bing J (now JCA) in *Golden Vale Golf Range & Country Club Sdn Bhd v Hong Huat Enterprises Sdn Bhd* [2005] 5 MLJ 64 at p 76, ; [2005] 5 CLJ 289, at p 298 as follows:

> In the light of the conflicting evidence, I will have to analyse the entire oral evidence adduced in the trial and test it against contemporaneous documents in order to arrive at the truth and formulate any specific finding of facts. This approach has been enunciated by the Supreme Court in *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez Anor* [1989] 1 MLJ 35 at p 37 (SC), where Wan Hamzah SCJ (as he then was) in delivering the judgment of the Supreme Court agreed with the soundness of the observation made in *Armages Ltd v Mundagas SA; The 'Ocean Frost'* [1985] 1 Lloyd's Rep 1 which reads:
>
> > It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witnesses' motives, and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.

[17] I will adopt the same approach to analyse all the oral evidence adduced by the parties along with all the relevant contemporaneous documents to determine the probability and/or improbability of the versions of the parties herein.

[18] The first plaintiff (SP1) vide his witness statement (P1) testified that he is the chairman of 'Persatuan Tanah Perkuburan Cina Hokkien 'Leong Hock Teong, Permatang Sintok, Seberang Perai Utara' which was formerly known as 'Leong Hock Teong (Tanah Perkuburan) Permatang Sintok' and that the plaintiffs were responsible for all the care of the burial grounds comprised in Lot 833, 834, 3423, 2353 and 2228, ie the said lands. Possession and supervision of the said burial grounds were in the hands of the Committee of Persatuan Pengurusan Tanah Perkuburan Leong Hock Teong, Permatang Sintok, Seberang Perai Utara ('the Persatuan') since 1952. In his witness statement P1 Q & A 4, SP1 said that the burial ground was under the control

of Ching Tee and Song Cheok Kow as trustees of the land since 1917 and after they died, the plaintiffs as the Committee of the Persatuan became responsible for the supervision of the burial ground since 1952. I must pause to say here that there is absolutely no evidence that the plaintiffs were in the Committee since 1952 as their names had never appeared in bundle B p 78 of the purported Committee. SP1 said further that since 1917, the trustees and the burial ground Committee at that time had drawn up various rules for the supervision of LHT. This assertion is unsubstantiated as there was temporary rules as in bundle B pp 79–80 but there is absolutely no evidence that this temporary rules were drawn up since 1917. In April, July, October and December 2004, SPI stated that the defendants had without consent and approval from the plaintiffs sold four plots of the burial ground in Lot 3423 to several families of deceased including non-Hokkien clans. SP1 then instructed his solicitors to issue a notice to the first defendant as chairman to stop selling the plots in the burial ground. However, it was ignored; thus both the plaintiffs as well as the defendants are now selling the plots in the burial ground at the price of RM1,500 for a single lot and RM2,500 for a twin lot. SP1 asserted that defendants cannot sell the plots in the burial ground as the plaintiffs are holding the lands of the burial ground as constructive trustees. In 1998, SP1 said vide his supplemental witness statement P1A that he was chairman for LHB and the Persatuan. The plaintiffs did not have a bank account then as the Persatuan was not registered. He explained that because of that all monies collected from the burial ground were deposited into the defendants' or LHB's account to hold on trust for the plaintiffs.

[19] The fourth plaintiff (SP2) testified vide his witness statement P4 which in cross-examination, he agreed that his evidence was identical with SP1's evidence in P1 as he had discussed with SP1 his answers in his witness statement P4. Since SP2 has so admitted that his answers were discussed with SP1, it gives rise to a doubt whether the answers in his witness statement represents his own or that they were provided by SP1. In the circumstances, evidence of SP2 ought to be viewed with caution.

[20] In submission, plaintiffs referred to the land titles in bundle B pp 54–70 and the trust deed in page 63 which says that 'LHT Burial Ground' to be held on trust which occurred in 1917 and submitted that the said 'LHT Burial Ground' existed as an independent trust body. Referring to exh P2 (bundle B pp 71–80 with the translation), a committee of Leong Hock Teong Burial Ground had been created in 1952 (bundle B p 78). The plaintiffs submitted further that the minutes of meeting in bundle F1 pp 1, 6, 11 and 14 showed that the management committee had convened meetings. On 18 May 2004, an Interim Sovereign Rights Protection Committee was formed and the Persatuan was subsequently registered with the Registrar of Societies It was further submitted that LHT had issued its own receipts for its transactions and that the

cheque and receipt for the sum of RM11,715.87 in the account of LHB showed that this amount was trust fund for LHT. On LHB's statements of account vide bundle B pp 3–9 which LHT was cited as a subcommittee of LHB, the plaintiffs submitted that it is a nomenclature and merely an accountant's phrase as SP1 (the first plaintiff) who was the then Chairman stated in evidence that there was no subcommittee. Last but not least, the plaintiffs submitted that the fact that LHT burial ground has been registered as a society showed that it is operating as a society independently.

[21] The defendants' evidence showed that at all material time, it was the defendants' society which has the rights and responsibility over the care, supervision and the sale of the burial lots of LHT in accordance with the Chinese custom and the history of LHB. Evidence of SD2 who is now 92 years old showed that he came to Malaysia from China in April 1935 and has been living in Penaga where LHB is since 1947. He had often been praying in LHB and had been a Committee Member of LHB before. According to him, LHB had been there for about 80 over years when he moved to Penaga in 1947. Prior to 1947, LHB had been looking after LHT and at his time, they (LHB) continued to look after LHT. He added that the Hokkiens who had been elected Committee Members of LHB would take care of the affairs of LHT ie the elected members of LHB would hold the same position in LHT. He is assertive that they are not separate bodies. It is for this reason that he came to court voluntarily to testify to that effect. SD3 who is 79 years of age, born and bred within Penaga area testified that since his young age, he knew of LHB which is the Tua Peh Kong Temple and it had the burial ground LHT. In 1997, he was elected as assistant secretary of LHB when Ong Cheok Teow was the chairman. He said that the burial ground LHT was bought by the Committee of LHB and it was LHB which has the right to look after LHT. Similarly, it was the Committee Members of LHB who had the power to sell the burial lots of LHT. He added that whoever the devotees of Tua Pek Kong deity could obtain the burial lot by donating RM10 to LHB. Sometime in 1997 when his mother passed away, SD3 bought the burial lot for RM2,000 because the size of it was big and the said money was received by the secretary and/or treasurer of LHT who are the same secretary and/or treasurer of LHB; receipt was also issued by LHB, whatever payments received by LHT had to be handed to LHB. To him, there was only one Committee ie the LHB Committee. SD3 was also assertive that LHB and LHT were not separate bodies and that there were no 2 separate Committees. That was the position even when SP1 was the chairman as SD3 himself was the vice chairman then. SD4 is 80 years old. He was born in China and came to Penaga at the age of 6 with his mother and has been living in Penaga ever since. He said that LHB had existed when he came to Penaga. He had been serving as Secretary of LHB for three terms and emphasised that the elected members of LHB would also manage the affairs of LHT and that LHT is the asset of LHB. SD5 (the third defendant) is the treasurer of the defendants' society since 2001 till the date of trial. She said that LHB is the

temple that took care of the affairs of the burial ground LHT. The first plaintiff had been the acting chairman and later chairman of the LHB for the terms 1997/1998–2002/2003. During the tenure of first plaintiff as acting chairman and chairman of LHB, it was the Committee of LHB including the first plaintiff who had the power to care, supervise and sell the lots of LHT. Referring to the account of LHB from 1999 to 2002, prepared by her vide bundle B pp 3–10, SD5 stated that there was no objection particularly on B pp 5–6 which is as reflected in item (3) in the minutes of the Committee meeting of LHB held on 18 February 2001 (bundle B pp 39–41) where she had attended and her report of account B p 5 was passed. Vide item (4) in the same minutes of the Committee meeting, LHB Committee had also passed a resolution to appoint and authorise five persons as trustees of Hokkien Leong Hock Beoh and Leong Hock Burial Ground namely (1) Ooi Lian Seng (2) Ong Joo Kuang (3) Tan Thian Siang (4) Teoh Hin Chye and (5) Tan Lee Hoe. SD5 stated such appointment of the trustees for both LHB and LHT was because LHB was in charge of LHT and the management unit of LHT was a subcommittee of LHB. On the fixed deposit receipt of LHB in bundle B pp 11-14, SD5 explained that these were the money for the sale of burial lots of LHT paid into the account of LHB from time to time by the Committee Members. As to the general cash voucher as shown on bundle B pp 17–18, SD5 stated that the money belonged to LHB though written as trust fund of LHT. It was first plaintiff who wrote the voucher at B p 17 as she could recognise the first plaintiffs handwritings and matters of LHT at that material time was under the first plaintiffs hand. When the first plaintiff was chairman of LHB, SD5 said that she was the treasurer and there was no Committee and no chairman for LHT at that time. She disagreed that LHT is a separate entity from LHB but affirmed that it was a subcommittee of LHB. SD6 (the first defendant) was the chairman of LHB for the term 2003/2004 and an advisor till date of trial. He said that LHB existed about 120 years ago but was officially registered on 16 July 1997. He was however not sure when LHB was built and whether it was placed on trust since 1931 as he was not born yet. He also asserted that in the Chinese custom, a burial ground would not exist without a temple and the defendants' society was responsible for the care of LHT as well as selling the burial lots of LHT to the local residents. For the sale of the burial lots, the Committee of LHB would be responsible to do so. When Ong Cheok Teow, the chairman of LHB died in August 1997, the first plaintiff took over as acting chairman of LHB and he later became the chairman until the term 2003/2004. On the general cash voucher, bundle B p 17 which described the debit from Leong Hock Burial Ground trust fund account dated 23 April 2003, SD6 stated that it was not approved and passed by LHB as there was no signature at the stated column therein. As to the outgoings of LHT such as water and electricity bills, SD6 said that it was LHB which paid for those outgoings. SD6 stated that the Plaintiffs' society was formed when the first plaintiff had lost in the election of the Committee of LHB for the year 2003/20004. According to SD6, the burial ground of LHT is the property of

LHB and hence only the defendants' society has the right to care, supervise and to sell the burial lots of LHT. The first plaintiff did the same when he held the post of chairman of LHB. SD6 contended that the plaintiffs by registering the LHT as a society to care, supervise as well as to sell the burial lots of LHT has caused confusion among the local residents of the five localities who are entitled to buy the lots in the burial ground. SD6 further alleged that the first plaintiff after having lost in the 2003/2004 LHB Committee election had taken away all documents of LHB and the first plaintiff had refused to return them despite SD6's request. SD6 alleged so because it was the chairman who had access to those documents kept in LHB. SD6 said that LHT was managed by LHB but agreed that LHB's constitution did not say so. On the appointment of the LHT Burial Ground Committee vide bundle B p 78 in 1952, SD6 explained that as far as he knows, it was the same persons in LHB and LHT who managed LHB and LHT. He knew five persons named therein ie Ching Hoay Leong who was also the chairman of LHB and the first plaintiff's father; the treasurer Ong Cheok Teow who became the chairman of LHB in 1997; the vice chairman, secretary and assistant secretary. He also knew Ang Toh Khoon. A Committee Member who was LHB's treasurer in 1997/1998. He disagreed that LHB and LHT are separate societies and maintained that LHT was a subcommittee of LHB. He pointed out that LHT's constitution as shown in B p 74 with translation at pp 79–80 is temporary constitution. He contended that the registration of LHT vide the certificate at bundle B p 44 would not be recognised by LHB. SD7 (the second defendant) is the secretary of the defendants' society. He had been with the defendants' society since 1971. He said that according to Chinese custom, every Teong' or burial ground must have a 'Beoh' or temple to take care of it and LHT is under the care of LHB. It was the Committee Members of LHB including the first plaintiff during his tenure as acting chairman and chairman of LHB for the terms 1997/1998–2002/2003 to take care, supervise and to sell the burial lots of LHT. According to SD7, the first plaintiff did not involve himself with the defendants' society after he had lost in the election for year 2003/2004 but there is nothing to prevent the plaintiffs from becoming the Committee Members of the defendants' society as all Committee Members are elected by the members of the defendants' society and plaintiffs are welcome to return and join. Similarly, SD7 disagreed that LHB and LHT are two separate bodies and that LHB had no authority to sell the burial lots. He also disagreed that the first plaintiff was the chairman of LHB and LHT but that it was only one post. He further said that before the first plaintiff was defeated in the election of LHB, there was no election for LHT. Before LHT was registered SD7 stated that LHT had no Committee but was managed by the Committee of LHB.

[22] In submission defendants contended that the first plaintiff had admitted that the plaintiffs' Persatuan was registered only after he had lost in the LHB election for the year 2003/2004. Evidence of the defendants showed that before the Persatuan of the plaintiff was registered at all material time, it

was defendants' society or LHB which had the right and responsibility to look after, supervise and to sell all the burial lots of LHT in accordance with the Chinese custom and the history of the defendants' society. The fact that it was the temple (Beoh) which takes care of the burial grounds (Teong) according to Chinese custom is not challenged by the plaintiffs in cross-examination of the defence's witnesses. Hence it was submitted that the failure to cross-examine the defendants and their witnesses on this important aspects of their evidence must be treated as acceptance of those parts of their evidence citing *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31 (CA), *Paramill Sdn Bhd & Anor v Datuk Joseph Pairin Ketingan* [2007] 7 MLJ 289; [2007] 6 CLJ 192 (CA), inter alia. Learned counsel for the defendants also urged this court to exercise judicial notice to accept the unchallenged evidence of Chinese custom that a temple (Beoh) will look after a burial ground (Teong) as the first plaintiff himself had admitted in cross-examination that in general a burial ground would always have a temple. He cited, inter alia, the case of *Kordial Kor d/o Kundang Singh v EC Controlled Demolition Sdn Bhd & Ors* [2002] 7 MLJ 386 where His Lordship Abdul Malik Ishak J (now JCA) having endorsed the two Latin terms of *lex non requirit verificare quod aparet curiae* (the law does not require proof of that which is apparent to the court) and *quod constat curiae opere testium non indiget* (that which is established to the knowledge of the court does not require the aid of witnesses) and having adopted the approach taken by Scrutton LJ in *Peart v Bolckow Vaughan & Co* [1925] 1 KB 399, 417 that:

> The county court judge, acting as an arbitrator and sitting in district where he is very familiar with labour conditions, may use his own knowledge as to the probable wages, probable employment for like work, and conditions of labour …it would be a denial of justice to require these facts to be continually proved.,

said as follows:

> As opposed to general knowledge, there is also personal knowledge which a judge is entitled to rely on … Judges must be bold and be forward-looking. Judicial notice premised on either general knowledge or personal knowledge must be acknowledged as the surest way to expedite the process of a trial …

[23] The case of *Wonn Ngee Yew and Others v Ng Yoon Thai and Others* [1941] 1 MLJ 37 was cited on the principle that the courts will give effect to those settled practices followed by the Chinese where no provision is made in local legislation, so far as these practices are of a character, not being contrary to reason or natural justice, to which effect can be given with propriety.

[24] The defendants also urge this court to give weight to the evidence of SD2, SD3 and SD4 who are independent witnesses. On the documentary evidence, the defendants submitted that the statements of account (bundle B pp 3–10) and the writings engraved on the memorial stone outside the burial

ground, showed that LHT is part and parcel of LHB. It was also contended that if LHT was an independent body from LHB, Ong Cheok Teow, the chairman of LHB from 1991–1995 who proposed to register the defendants' society would have similarly made the proposal to register LHT but he did not; this was because, the defendants submitted, a burial ground will always be cared by a temple according to Chinese custom.

[25] On this issue of whether LHB and LHT are separate bodies, I first turn to the names of LHB and LHT to see whether there is any nexus between the two. My finding is that both LHB and LHT use the same name ie 'Leong Hock' (LH) as it is not disputed that 'Beoh' in Chinese Hokkien means a temple while Teong' in the same dialet means burial ground. The unchallenged evidence of the defendants and their witnesses that a 'Teong' is always under the care of a 'Beoh' according to Chinese custom has some bearing as in this case, the Teong uses the same name as the Beoh ie Leong Hock Teong and Leong Hock Beoh. I am of the view that if LHT is a distinct body by itself, it is unconceivable that it would use the same name as LHB or vice versa as no business entity would tie itself with a burial ground unless it is in the same line of business except a temple. Although LHT had been set up since the year 20 of the people's republic of China (which is 1932) and a committee had been set up in 1953 with temporary rules (bundle B pp 71–80), there was no evidence to show that they had acted independently thereafter. The book which contained minutes of meetings only commenced in the year 1991. I find that the mere fact that LHT was formed itself does not prove conclusively that it was an independent body. The court has to evaluate all evidence adduced by the parties together with all relevant documents before arriving at a proper finding. plaintiffs relied on the title deeds as exhibited in pp 54–70 of bundle B including the trust deed in p 63 bundle B to assert that LHT had been an independent trust body since 1917. Except for the indenture or trust deed in pp 63–66 in respect of the purchase of two acres of the land in Lot 836 Mukim v, Northern District, Province Wellesley by Ching Tee and Song Cheok Kow and held as joint tenant in trust for the benefit of the burial ground known as Leong Hock Teong Burial Ground, there is no evidence that the other lands of the burial ground were similarly held in trust because the other titles in bundle B pp 54–62 do not show the existence of a trust or trustee and the interim register in bundle B pp 68–69 do not prove so either. Moreover, after the deceased of Ching Tee and Song Cheok Kow, there is no evidence as to the status of that plot of land and no evidence of any replacement of trustees or conveyance of the trust. From the scanty and vague evidence, I am not satisfied that LHT was and is an independent trust body. The evidence of the defence witnesses SD2–SD4 who are the elders of the community in that locality and who had also been involved in both LHB and LHT showed that LHT since time memorial had been under the care and management of LHB not only according to Chinese custom in that locality in particular but also historically. I find SD2, SD3 and SD4 are independent, competent and material witnesses

as they are not partisan to the parties herein but came to court voluntarily to speak the truth of what they knew having been living in the same locality as well as having been previously involved in the Committee of LHB which had ali along been looking after the affairs of LHT; I am inclined to find that they have no interest in the success or failure of the case as such and I do find their evidence inspires the confidence of the court; see *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 (FC). The plaintiffs attempted to submit that the knowledge of these three elders are basically hearsay for lack of exact account and documentary evidence. I do not agree. SD2, SD3 and SD4 have been living in the same locality for about 60–80 years. The Chinese customary right and practice that they knew in respect of LHB and LHT had been following all those years cannot be brushed aside by alleging hearsay. When they had performed the customary right and practice that governed LHB and LHT for those many years, to this court, it has become their actual knowledge of such custom and practice which had been accepted and practised by the elected Committee Members of LHB all those years. Under s 48 of the Evidence Act 1950, opinions as to the existence of any general custom or right of persons who would be likely to know of its existence are relevant and hence admissible. I find SD2's–SD4's evidence in this respect to be relating to facts known and practised by them; they are cogent and I accept them. With their evidence of the custom and/or practice of a temple (LHB) taking care of the affairs of a burial ground (LHT) in their locality which is not in dispute, there is no necessity for this court to import its own knowledge to determine this point. The plaintiff contended that if a 'Beoh' is required to take care of a 'Teong', there is a Tua Pek Kong temple at the burial ground itself which sufficed to satisfy the Chinese custom. I do not find this argument tenable as the 'temple' in the burial ground is a pavillion which exists in every Chinese burial ground and is distinct from a governing temple although there is always a Tua Pek Kong deity within the pavillion. The 'Beoh' referred to is a proper temple and not the pavilion at the burial ground. The plaintiffs had referred to several minutes of meetings in bundle F pp 1–20 and bundle F1 which showed that the Committee meetings were held at the LHT pavillion. With the aid of the Chinese Interpreter of this court I have gone through the original minutes of meetings as contained in an exercise book produced to this court and found that apart from bundle F–F1, the sponsors' management general meeting held on 10 March 1996 (Sunday) at 5pm, was convened at the temple hall of LHB, attended by the first plaintiff among others. Similarly, for the Sponsors' general meeting held on 11 April 1999 (Sunday) at 4pm, it was also convened at Penaga LHB. These were not produced in bundle F–F1 as they are apparently or probably evidence in favour of the defendants since both the general meetings were held at LHB, the temple. Hence, the fact that some of the Committee meetings of LHT being held at the pavilion in front of the LHT burial ground does not signify nor prove that LHT is a separate body from LHB. Indeed, the minuets on 10 March 1996 and 11 April 1999 showed the general meetings of the sponsors were in fact held in the temple of LHB and

not at LHT pavilion lending weight to the defendants' version that the 'Beoh' governed the Teong'. The plaintiffs attempt to establish that LHT is independent as it had its own Committee meetings. In this respect, a subcommittee of a society could also convene meeting and have minutes of meeting. Minutes of meeting alone without more do not necessarily prove that LHT is an independent and separate body. One pertinent fact which cannot be ignored is that the immediate past chairman of LHB before the first plaintiff ie Ong Cheok Teow, was the one who proposed that LHB be registered as a society under the Societies Act 1966 and it was upon his proposal that LHB was ultimately registered as a society. From bundle F pp 1–12 minutes of LHT Committee meetings, they showed that the meetings were chaired by the said Ong Cheok Teow who was the chairman of LHB at that material time. If LHT had been a distinct and independent body from LHB, surely there would be minutes of the general meeting which narrated the separate election of Ong Cheok Teow as chairman of LHT. In addition if LHT had been construed as an independent body from LHB, there appeared no apparent reason why Ong Cheok Teow had only proposed for LHB to be registered as a society and left out LHT in total. The probable and reasonable inference that can be drawn by this court basing on these facts is that LHT as in accordance with the Chinese custom particularly in the locality of Penaga and the other four localities that it rendered the service as well as historically, had been under the care and management of the temple LHB. That could probably have explained why no proposal to register LHT as a society if indeed it is a separate and independent body from LHB. From the statements of account for year 1998, 2000, 2001 and 2002, bundle B pp 3–10 and evidence of the third defendant (SD5), the treasurer of the defendants' society since 2001 who is still holding the same, these statements of account were during the tenure of the first plaintiff as chairman of LHB and in these statements, it was vividly stated that LHT was the subcommittee of LHB (bundle B pp 4, 6 and 8) and that LHB also paid for the water and electricity charges of LHT burial ground as can be seen in the account for the year 2001 and 2002 (bundle B pp 8 and 10). Astonishingly, if it is true that LHT was not under the management and care of LHB nor that it was its subcommittee, the first plaintiff as the chairman, as he claimed, of not only LHB but also the chairman of LHT, would surely have rectified that glaring error. He did not but happily endorsed the statements of account. He must therefore be taken to have accepted the fact as expressed that LHT was a subcommittee of LHB. There is no merit for the plaintiffs to submit that the term 'subcommittee' is nomenclature and a mere accountant's phrase as SD5 who prepared the account particularly in bundle B p 8 affirmed that LHT is a subcommittee of LHB and she had put it down accordingly. Since the first plaintiff as chairman and the other committee members had endorsed and passed this account without objections and amendment, the fact of LHT being a subcommittee of LHB must similarly be accepted in line with their wishes.

[26] Emphasis has been levelled by the plaintiffs that money received for

selling the burial lots of LHT were deposited with the account of LHB as trust fund of LHT and LHT had been issuing its receipts for those sale. The defendants contended that if LHT was a subcommittee of LHB, even if LHT had sold the burial lots and received money, it had to report or account its collection of money to LHB. From the statements of account aforesaid, I am inclined to agree with the defendants' contention because LHT's collections were paid to LHB as in the accounts. In that sense, the fact that LHT had issued receipts in its name does not necessarily signify that LHT was a separate body with the money received being paid into the account of LHB. The statements of accounts vide bundle B pp 3–10 for the years 1998, 2000, 2001 and 2002 did not describe the payments made to LHB from the subcommittee of LHT to be trust money for which LHB was to hold on trust for LHT. The fixed deposit receipts from Public Bank Bhd as in bundle B pp 11–14 which allegedly referred to the monies received for the sale of burial lots were also issued in the name of LHB or in the name of the defendants' society without stating that the money were held on trust for LHT. No evidence of trust can be attributed to these fixed deposit receipts. Bundle B pp 17–18 shows a general cash voucher dated 23 April 2003 where it stated that the amount of RM11,715.87 was debited from LHT trust fund with the cheque issued to the first plaintiff on 17 April 2003 (bundle B pp 15–16). However, according to SD6 (the first defendant), the chairman of LHB for 2003/2004, there was no approval by LHB as no signature appeared at the column of 'approved & passed by'. The treasurer at the material time, SD5 (the third defendant) said in evidence that she recognised the writings on this general cash voucher which belonged to the first plaintiff and it was the first plaintiff who signed in the 'received by' column. From all these evidence, I find that it was the first plaintiff who wrote or who alleged that the sum paid out by himself to himself to be LHT's trust fund without it being so endorsed by LHB particularly of the existence of a trust fund. The payment made out vide this general cash voucher was in relation to earth piling work at Leong Hock Burial Ground. These were expenses which were disbursed by LHB rightfully because all money received by LHT were paid into LHB's account. The aforesaid statements of account also revealed that LHB also paid for the outgoings of water and electricity of LHT but there is no evidence that those payments of outgoings were from any trust money. Hence, this general cash voucher can only be reckoned as self-serving. The plaintiffs did not produce the account for 2003 to substantiate their contention or allegation that what was stated in the said voucher was in fact as stated in the statement of account for 2003 as LHT's trust money. I find the allegation of LHB holding the said sum of money on trust for LHT to lack merit. When the money received by LHT were paid to LHB, it is only right for LHB to disburse money for all the work done or carried out on the burial ground as well as other outgoings of LHT.

[27] Another vital piece of documentary evidence which goes to prove the fusion of LHB and LHT can be seen from the minutes of Committee meeting

dated 18 February 2001 (bundle B pp 39–41) when the first plaintiff was the chairman of LHB and he had attended this said meeting. This meeting was held in the meeting room of LHB. Pursuant to item (4) in this minute, it was recorded:

> (4) The committee also passed the resolution to appoint and authorize the following 5 persons to be the trustees of Hokkien Leong Beoh and Leong Hock Burial Ground, (1) Ooi Lian Seng (2) Ong Joo Kuang (3) Tan Thian Siang (4) Teoh Hin Chye (5) Tan Lee Hee.

[28] I find this resolution passed to be a compelling fact for this court to draw a reasonable inference that the defence's version that LHB was in fact managing the affairs of LHT to be more probable because even the trustees appointed were not just for Hokkien Leong Hock Beoh but also for Leong Hock Burial Ground indicating that they were under the same umbrella of LHB or that the temple and the burial ground were fused under one administration and it was most probable that the Committee of LHB also took care of the affairs of LHT all along until the plaintiffs attempted to reverse the status and to register LHT as a separate society when the first plaintiff had lost in his election as chairman in LHB.

[29] The defendants also submitted that the memorial stone in front of the LHT Tua Peh Kong Pavillion showed that the devotees of LHB had donated to build LHT and although LHT was located in Permatang Sintok, the memorial stone bears the title 'Penaga Leong Hock Teong' which showed the close nexus with LHB which is in Penaga. I have no reason to disagree with what had been engraved in the memorial stone. I agree that the relation between LHT and LHB is uncontroverted.

[30] From all the oral as well as documentary evidence in this case as deliberated above, I am inclined to hold that although LHT had formed its own Committee with temporary rules, it had all along been cared and managed by LHB and I am satisfied with the evidence that it was the same Committee of LHB who managed the affairs of LHT for all those years preceding its registration. LHT has been construed and accepted as a subcommittee of LHB since time memorial and this seemed to carry on until such time when the first plaintiff attempted to change it. From the existing Chinese custom that is not disputed by both parties, the historical aspect of both LHB and LHT and the conduct of the parties particularly the first plaintiff, I hold on a balance of probabilities and upon a finding of facts that LHT is not an independent body but that it is an arm of LHB.

THIRD ISSUE: ESTOPPEL

[31] The defendants submitted that the plaintiffs particularly the first

plaintiff when he was acting chairman of LHB and subsequently its chairman, had assumed responsibility of the care, supervision and the sale of the burial lots of LHT. Evidence of the defendants showed that LHT had at all time under the care and management of LHB including the sale of the burial lots. Statements of account during the period when the first plaintiff was acting chairman and chairman of LHB also showed that LHB was responsible for LHT. Hence the defendants submitted that the first plaintiff who registered LHT as a society had approbated and reprobated his action citing *Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai Kg Sdn Bhd) and another appeal* [2006] 1 MLJ 505; *Teo Kim Huatt v AETNA Universal Insurance Bhd. (No 1)* [2002] 2 MLJ 333. The plaintiff nevertheless contended that the question of approbate and reprobate does not arise as there is no question of the plaintiffs having taken two courses of conduct. The first plaintiff (SP1) had considered himself holding two positions and had treated LHT as a separate body. The plaintiffs had been maintaining that LHT and LHB are separate bodies and they had never said in evidence that LHB had control over LHT.

[32] Whether a party can be said to approbate and reprobate is basically to be assessed from the conduct of the party. Although SP1 and SP2 (the first and fourth plaintiffs) did not testify that LHT was under the control of LHB, the question is by the conduct of first plaintiff as acting chairman and chairman of LHB he had so acted that it became apparent that LHB under his leadership, had exercised the same control and management of LHT as it had been before accepting it as an arm of LHB or as its subcommittee. To reiterate some of the documentary evidence adduced, the statements of account (bundle B pp 3–8) during his tenure showed that LHT was a subcommittee of LHB and the minutes of the Committee meeting of LHB on 18 February 2001 (bundle B pp 39–41) when the first plaintiff was chairman had passed a resolution to appoint and authorise five persons to be trustees for LHB as well as for LHT. The first plaintiff as chairman of LHB had raised no objection but had endorsed them. When he had lost in the election in LHB Committee for the term 2003/2004, he contended that LHT was a separate body and took steps to register it as a separate society without any consultation with the Committee of LHB. The plaintiffs contended that they and in particular the first plaintiff had all along considered and treated LHT as a separate body. If that was true, I find such contention difficult to reconcile with the first plaintiffs endorsement of the statements of account depicting LHT as a subcommittee of LHB and of the resolution where the same trustees were appointed and authorised for both LHB and LHT signifying both LHB and LHT are same entity. In any event, any decision in a society must come from the joint consensus of the Committee. This will be particularly so when the attempt is to separate an arm or a subcommittee to convert it to a separate entity. Such major decision must, in my view, come from the general meeting of the society and not merely by the Committee. The first plaintiff although as chairman cannot unilaterally

construe or treat as he wished that LHT was a separate body. His personal view has no effect unless it is endorsed by the general meeting of the society ie LHB. He had been towing the same line when he was the acting chairman and chairman of LHB without raising in any of the general meetings that LHT was a separate body of LHB nor did he propose that LHT ought to be separately registered when Ong Cheok Teow had proposed to register LHB under the Societies Act 1966. It is apparent that his claim manifested after he lost in the 2003/2004 election contending that LHT had been considered and treated as separate body. In *Fawziah Holdings*' case, His Lordship Gopal Sri Ram JCA (as he then was) described the principle of approbation and reprobation at p 515 in the following:

> You cannot affirm so much of a transaction as benefits you and seek to avoid that part of it that imposes a burden. You cannot pick and choose. You must either affirm the whole transaction or avoid the whole of it. There is no half-way house. Take the present instance. There are many clauses in the sale and purchase agreement. Some confer benefits on the defendants. Others may appear burdensome. Also there are several interlocking agreements entered into between the parties. Again, some may be beneficial and others burdensome. What the defendant is seeking to do here is to avoid selected parts of the transaction. It is seeking to approbate and reprobate. It cannot do that.

[33] His Lordship went on to cite *Halsbury's Laws of England* (4th Ed Reissue), Vol 16 para 957 at p 844 which states:

> On the principle that a person may not approbate and reprobate a special species of estoppel has arisen. The principle that a person may not approbate and reprobate express two propositions:
>
> (1) that the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile; and
>
> (2) that he will be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct, which he has first pursued and with which his subsequent conduct is inconsistent.,

and the case of *Verschures Creameries Ltd v Hull & Netherlands Steamship Co Ltd* [1921] 2 KB 608 where Scrutton LJ said:

> A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

[34] By the first plaintiffs conduct of endorsing the statements of account accepting LHT as the subcommittee of LHB and the resolution which

appointed the same trustees for both LHB and LHT as stated above, during his tenure as the acting chairman and/or chairman of LHB and that there was no evidence in any of the meetings that LHT was considered a separate body, he had shown or that reasonable inference can be drawn that he had accepted the fact that LHB was the governing body of LHT and that LHB and LHT were within the same entity; hence, an approbation. The first plaintiffs subsequent contention that LHT was and is a separate body from LHB indicating that he was and is resiling from his earlier conduct which is inconsistent, is indeed an attempt to reprobate. The first plaintiff cannot pick and choose to suit his quest for power after his failure to be re-elected in the 2003/2004 term of election. If he is keen to serve the community, as he had righty submitted that it is a voluntary service with nothing to gain, I find no cause for him to split LHT from LHB, both of which were managed and supervised by him during his tenure but to try to stand in the next election of the Committee. On the facts of this case, I am inclined to agree with the submission by the defendants that there is approbation and reprobation wherein estoppel would arise to estop plaintiffs from reneging and asserting that LHT is a separate body, independent from LHB.

FOURTH ISSUES: REGISTRATION OF PERSATUAN PENGURUSAN TANAH PERKUBURAN CINA HOKKIEN LEONG HOCK TEONG

[35] Upon the preceding second issue, since the bond between LHB and LHT has been established that LHT has been under the care and management of LHB, the separate registration of Persatuan Pengurusan Tanah Perkuburan Cina Hokkien Leong Hock Teong would be to usurp the governing role of LHB over LHT. Evidence showed that it was Ong Cheok Teow, the then chairman of LHB who also presided and chaired LHT meeting, who proposed that LHB be registered as a society but did not so propose that LHT be also registered during his tenure. The first plaintiff similarly did not propose that LHT be registered too. This showed that the customary right of a Beoh over a Teong has been entrenched. The defendants submitted that plaintiffs have no right to register LHT as a society and if at all it is to be so registered, it must be registered through the Committee of the defendants' society. The plaintiffs particularly the first plaintiff contended in evidence that LHT is opened to the public and its registration could be applied at any time. From the evidence before the court, I do not agree that LHT is opened to any general public but to the particular Hokkien clan in the five localities although some Cantonese had been allowed to be buried there. It is thus restrictive and subject to the approval or consent of LHB and/or LHT, an arm of LHB. Thus, any proposal or decision to apply for LHT to be registered as a society separately ought to have been made to the Committee of LHB which is the governing society at the general meeting. I do not think that the first plaintiff can dissect LHT from LHB by applying to register LHT without the consent and approval of the

Committee of LHB at general meeting thereby vesting himself with the power over LHT after he had lost in the election as chairman in LHB.

[36] In the letter dated 5 February 2005 from the Director of The Registration of Societies Department, Penang (bundle B p 2), it was stated that the said Department withdrew or cancelled the registration of the plaintiffs' Persatuan; its registration was still pending because of various new information which gave rise to a doubt as to who had the right to look after the said burial ground. However, according to SD1, the director of the said Department, the registration of plaintiffs' Persatuan dated 28 January 2005 vide certification of registration in bundle B pp 44–53, remained unchanged and so registered because no notice pursuant to the Societies Act 1966 had been issued to the plaintiffs. What SD1 had referred to is s 13(2) of the Societies Act 1966 which states that:

> (2) Where the Registrar proposes to cancel the registration of any registered society under paragraph (1) (c) the Registrar —
>
> (a) shall notify one or more of the office-bearers of the society of his intention to cancel the registration of the society; and
>
> (b) shall give him or them an opportunity to submit reasons in writing within 30 days from the date of the notification why the registration should not be cancelled.

[37] SD1 explained that no such notice was issued as the officer in charge of the matter had been transferred. In other words, if notice pursuant to s 13(2) of the Act above had been issued, the plaintiffs' Persatuan might have been de-registered. Be that as it may, with the findings of this court above that LHT was under the care and supervision of LHB, I do not think that the registration of the plaintiffs' Persatuan should be allowed to remain.

FIFTH ISSUE: THE DEFENDANTS' COUNTERCLAIM

[38] On the defendants' claim that the said lands of LHT to be the property of their society, I find insufficient evidence being tendered apart from viva voce assertion to prove that the defendants' society had bought the said lands. Hence prayer 10.1. in the amended counterclaim in bundle A p 37 is not proved on a balance of probabilities. On prayer 10.2, I am satisfied from the evidence before the court that it was the Committee of LHB which was responsible for the care, supervision and the sale of the burial lots of LHT. I have dealt with prayer 10.2.1 as in the second issue above.

[39] As to prayer 10.3 of whether the first and/or second plaintiffs are in possession of all records and documents including the land titles of LHB and LHT and to return them, from the evidence of this case and the fact that the

first plaintiff had enclosed in the bundle of documents ie bundle B of the statements of account, the indenture and titles of lands for LHT, produced the original booklets regarding inception of LHT and minutes of meetings and the copy of trust deed for LHB tendered to court though not marked as exhibits, inter alia, I have no doubt to hold that the first plaintiff, in particular, as the acting chairman and chairman of LHB who had custody and/or access to all these relevant and important documents and records of LHB and LHT, is having possession of them to be able to reproduce them in the plaintiffs' bundles of documents as well as producing some of the originals in court. These records and documents which had been the property of LHB ought to be returned to LHB as the rightful owner.

CONCLUSION

[40] Having considered at length all the evidence of both parties and documents produced before this court together with the respective submissions, I find on a balance of probabilities and upon a finding of facts that the plaintiffs have failed to prove their claims against the defendants and consequently plaintiffs' case is dismissed.

[41] On the defendants' counterclaim, I find on a balance of probabilities that the defendants have proved prayer 10.2–10.3 of the amended counterclaim at pp 37–38 in bundle A for which the plaintiffs have failed to rebut. Therefore I allow the defendants' counterclaim as in prayer 10.2, 10.2.1, 10.3 and 10.4 in the amended counterclaim. Prayer 10.4 must be complied within 30 days from the date hereunder. Prayer 10.1 not having been proved is disallowed.

[42] On the question of costs, I am inclined to say that both parties are in fact performing voluntary service to the Chinese community in the localities managing the temple and the burial ground. No party should hope to derive any benefit or interest from the management of them. To this court, there is absolutely no necessity to litigate over who should be in control of the temple and/or the burial ground if the honest and true intention of the parties are to perform voluntary service for the benefit of the community. I believe that for the good voluntary service that one has contributed to the society, one will ultimately be blessed. Generally, litigation costs in the High Court are high and the losing party may end up paying high cost that may range from tens of thousand. In the instant case, I am however exercising my discretion of not awarding costs against the plaintiffs in the hope that they will continue to serve the community in their localities. As stated by the second defendant (SD7) who is the secretary of the defendants' society, the plaintiffs are welcome to rejoin and participate in the defendants' society. Their services are still needed

and I do hope that the plaintiffs will consider the offer seriously and continue with their voluntary service with all sincerity.

Plaintiffs' claim dismissed and defendants' counterclaim allowed.

Reported by Kanesh Sundrum